No. 105.

(Br. of Thacher for K. C.)

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# Supreme Court of the United States.

**OCTOBER TERM, 1902.**

**No. 105.**

CHARLES F. GALE, as Receiver of the Elmira National Bank,

*Plaintiff in Error,*

*against*

CHASE NATIONAL BANK,

*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

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# Supreme Court of the United States.

OCTOBER TERM, 1902. No. 105.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff in Error,

AGAINST

CHASE NATIONAL BANK,
Defendant in Error.

Brief for Defendant in Error.

This case comes before the Court upon a writ of error to review a judgment of the Circuit Court of Appeals which affirms a judgment of the Circuit Court.

The judgment of the Circuit Court was in form in favor of the plaintiff, for $12.50 and interest, but substantially in favor of the defendant; and was entered upon the verdict of a jury, after a long trial, which began on Monday, October 22d, and ended on Friday, October 26th, 1900 (Record, p. 17).

The case had been previously tried before Judge TOWNSEND and a jury, the first trial beginning on October 30th and ending on November 6th, 1899. Upon the appeal from the judgment on the first trial the Circuit Court of Appeals directed a retrial of the action (104 Fed. R., 214). The opinion of the Circuit Court of Appeals on that former appeal was written by Judge SHIPMAN, before whom the second trial was had, which is the subject of the present appeal.

The claim upon which this action is based, as presented by the plaintiff, is for a balance due to El-

mira National Bank upon its deposit account in the Chase National Bank.

The claim is sought to be proved by the plaintiff (Record, pp. 20, 21) by showing a statement of that account which was rendered by the Chase National Bank, which shows upon its face a balance which it is admitted has been paid in full, and then, in impeachment of one item of charge therein against the Elmira National Bank of $15,012.50, producing a check for that amount, which he claims was improperly charged, leaving, therefore, that amount still due.

The facts relating to that charge of $15,012.50 are as follows: J. J. Bush was the cashier of the Elmira Bank. The Chase Bank held a note made by him which was originally for $25,000, but had been reduced by two payments of $5,000 each to $15,000 (Record, p. 22). This note was secured by bank stock as collateral. On the afternoon of May 4, 1893, Mr. W. H. Porter, who was the vice-president of the Chase Bank, called up Mr. Bush on the telephone, and stated that the bank stock was no longer satisfactory to the directors of the Chase Bank as collateral, and asked him to improve the collateral; he replied that he would pay off the loan the next morning. The next morning (May 5th) he called on Mr. Porter at the Chase Bank, and stated that he had come to pay his loan, and tendered for that purpose a package of cash—to the amount of $8,000—and a cashier's draft of the Elmira National Bank, drawn to Bush's order, on the Quaker City National Bank, for $7,000. Mr. Porter told him that a draft on Philadelphia could not be taken as cash in payment of a note payable in New York City. Mr. Bush was anxious to use the draft, and asked Mr. Porter if he could suggest how this could be done. Mr. Porter stated that he knew no way unless he drew his personal check on the Elmira Bank for the amount of the loan, and, as cashier, endorsed it as accepted and payable at the Chase Bank, which would make it *New York funds* available to pay a note payable in New York City, and, at the same

time, deposited the $8,000 currency and the $7,000 draft to the credit of his bank. Bush accepted this plan, and it was carried out, the check being for the amount of the note, with $12.50 of interest added. The deposit of the cash and draft and the drawing and charging of the check were thus parts of a single transaction carried through for the purpose of using the cash and draft to pay the note to the Chase Bank. The $8,000 cash appears credited to the Elmira Bank on May 5th in the statement of account above mentioned, and the $7,000 draft was subsequently paid by the Mercants' Bank of Philadelphia, and appears credited on said statement of account on May 8, 1893, the date of its payment. These two items of $8,000 and $7,000 are a part of the items making up the credit side of the deposit account upon which the plaintiff bases his claim of an obligation of the Chase Bank to pay (Exhibit B, Record, p. 20).

The testimony as to the transaction in which this deposit was made and this check drawn was given by William H. Porter, who in 1893 was vice-president of the Chase Bank, but who from January 1, 1899, has been vice-president of the Chemical Bank in this city (Record, pp. 21–24), and by Stephen Voorhees, who on May 5, 1893, was discount clerk of the Chase Bank, but who from July, 1899, has been the New York agent of the Merchants' Bank of Halifax (Record, pp. 32–34). There is no conflict of evidence with regard to this transaction, excepting as to the original form of the $7,000 draft, Bush the only other party to it, though his deposition was taken by plaintiff (Record, p. 34), not having been asked by him to in any way contradict it. The question as to the $7,000 draft is whether when it was originally presented to the Chase Bank it was drawn to the order of J. J. Bush, or of J. J. Bush, cashier. In its present form it is to the order of J. J. Bush, cashier; but Mr. Porter testified explicitly that when first presented to him on the morning of May 5th it was drawn to the order of J. J. Bush, and the word "cashier" was not written there, but that after it had

been decided to make the deposit Mr. Bush endorsed it, signing his name J. J. Bush, cashier, and then, seeing that this did not correspond to the face, to make the face correspond to the endorsement, wrote in the word "Cashier" (Record, pp. 26, 29,30):

> "He added the word 'cashier' on the $7,000 "Quaker City draft in my presence. * * * The "addition of the word 'cashier' was made in my "presence after the endorsement on the check. "I was present and saw the addition made there" (p. 29).

Against this direct testimony is some inconclusive testimony by Bush in his deposition (Record, p. 98) and some expert opinion evidence by the witness Kingsley (Record, p. 97).

At the time of taking this check and draft Mr. Porter believed that they were Bush's own property, which he had a right to use in payment of his own debts (Record, p. 26); he had at that time known Bush for some years, and, so far as he knew, he was of good standing and reputation in the community; he had not the slightest reason, so far as he knew, to doubt his right to do what he did on May 5th; he had been highly recommended to the Chase Bank as to his integrity and standing in the community (Record, p. 32).

Probably it would not be possible for either party to this case to make a statement of the result of the evidence as to the transaction between Bush and The Chase Bank without giving it color which would in some respects be misleading. The whole testimony as to this transaction is given by Porter and Voorhees. This is brief and clear, and is included in pages 21 to 34 of the Record, and we would respectfully request the Court that they consider this testimony directly, rather than any statement of it made by either party.

The evidence as to the authority of Bush, the cashier, to draw drafts in his own business, is stated with considerable fullness in Point XI. below, and the facts tending to show how far the investigation in the case has probably elicited all the pertinent facts are also there discussed, and a reference to that Point will probably be more useful than a direct criticism of the statement of facts of the plaintiff in these respects.

The defendant does not admit, either by pleading or otherwise, that the currency or the draft belonged to the Elmira Bank.

The note and collateral of Bush remained in defendant's possession simply for the convenience of Bush, and subject to his order, and without any rights therein of the defendant, which did not, after the payment on May 5th, remain in any sense the owner of the draft or holder of the stock as collateral, or entitled to enforce them (pages 24, 33, 34 and 82).

As to plaintiff's suggestion that the seven thousand dollar draft was originally drawn for a blank amount and filled up for $7,000 at The Chase Bank, there is nothing to support this suggestion in the evidence excepting the statement of the handwriting expert that the words "seven thousand" were apparently in the same ink as certain other writing on that draft, though it does not appear by his testimony that the figures "$7,000" were also in that ink (page 97). On the other hand, Porter testifies directly that Bush took the currency and draft from his satchel (page 22), and that when Porter first saw it, it was a complete draft for $7,000 (page 29).

The plaintiff claims that the $8,000 cash was the property of the Elmira National Bank, and that he had no authority to draw the $7,000 draft, but this does not appear in his pleading.

As it is admitted that the balance appearing on the *face* of the account has been paid in full (Record, pp. 20, 21), and no other items in it are in any way brought

into question by either side, no attention need be given in this case to any but the said items of $15,012.50, $8,000 and $7,060.

The subject which has so far in this litigation been the principal subject of controversy is the question of the authority of Bush, as cashier of the Elmira Bank, to draw cashier's drafts of that bank for use in his own business. This subject we have discussed at very considerable length in Point XI. below. There are, however, other points which seem to us important, and, in fact, substantially decisive of the case, even if no such authority were shown, and which, therefore, logically seem proper to be presented before the discussion of such authority, and we have, therefore, followed this order in this brief.

## POINT I.

### Errors not prejudicial to plaintiff are immaterial.

Therefore, if upon the record, on *any ground*, defendant was entitled as matter of law to a verdict to the extent of that rendered, errors, if any, in the conduct of the trial do not require a reversal.

"No judgment should be reversed in a court of "error when it is clear that the error could not have "prejudiced, and did not prejudice, the rights of the "party against whom the error was made."

Lancaster vs. Collins, 115 U. S., 222, 227.
Fidelity & Deposit Co. vs. Courtney, 186 U. S., 342, 351.
Cleary vs. Ellis Foundry Co., 132 U. S., 612, 614.

## POINT II.

**The claim of plaintiff as presented on the trial in this action is in contract for balance due on a deposit account in a bank. He cannot in this action recover for any other cause of action.**

The original complaint(Record, pp. 5–8) may be uncertain as to the intended basis of the claim for damages, and incomplete in the statement of a cause of action either for conversion, or in contract for a balance of account; it does not state any fund or balance with the Chase Bank, and may be open to the objection that no cause of action is stated in it. As a result of objection on this ground at the first trial, the plaintiff procured an order at that trial for an amendment of the complaint, apparently intended to state that there was a balance of $15,012.50 unpaid upon the account, payment whereof was demanded and refused (p. 9).

If there remains a doubt on the face of the pleading after this amendment as to the nature of the claim asserted, the plaintiff, by his presentation of his case, has put a construction upon it which is clear and conclusive upon him.

*His whole case is contained in a page and a half of the record (Record, pp. 20, 21), to which we call the particular attention of the Court.* It is as follows: *First*, a letter from the Chase Bank to Davis, the former Receiver, enclosing a statement of the deposit account of the Elmira Bank in the Chase Bank for the month of May, 1893; *then* that whole statement of account showing a resulting balance of $20,312.88 in favor of the Elmira Bank; *then* the check for $15,012.50, which is described in the complaint; *then* certain evidence of a demand and refusal; *then* an admission that the balance of $20,312.88, appearing on the face of the statement of account, had been *paid*, and an

unaccepted tender in court to counsel for the Chase Bank of the check for $15,012.50.

His case consisted of the admissions contained in the statement of account—namely, of the balance in that account brought over from the previous month, and of the various deposits during the month of May, but qualified by all of the statements of debit, also contained in the account, so that the final result of the admissions was that there was due to the Elmira Bank simply the sum of $20,312.88, which it is conceded has been paid; and then, in partial *contradiction* of this evidence, the *affirmative* impeachment of the item of May 5th for $15,012.50; the result being, according to the plaintiff's claim, that in this deposit account $15,-012.50 less was paid to or on the order of the Elmira Bank than the account stated, so that of the credits therein stated a balance of that amount still remains unpaid upon the account.

*This is the whole case which he presents and asks the defendant to meet.*

There is neither in the *complaint* nor in the plaintiff's *case* any statement or evidence as to the nature of the *items of $8,000 and $7,000*, nor any distinction between those items and any other items to the credit of the Elmira Bank in this account, and absolutely no basis laid for any claim, excepting on the theory of a balance due on the total account.

It is most familiar law, rigorously insisted on in the Courts of New York, that a recovery in an action can only be upon facts *alleged in the complaint.* It must be not only in accordance with the proofs, but in accordance with the pleading, and this notwithstanding the liberality of the New York Code.

Neudecker vs. Kohlberg, 81 N. Y., 296, 301.
Southwick vs. First National Bank, 84 N. Y., 420, 429.
Romeyn vs. Sickels, 108 N. Y., 650, 652.
Truesdell vs. Sarles, 104 N. Y., 164, 167.

"The party must recover not only by his

" proof, but upon his *allegations.* The facts " stated must constitute a cause of action, *and* " they must be in evidence. It is not enough that " they stand upon proof, unless that proof is *pre-* " *ceded by statement.*"

Clark vs. Post, 113 N. Y., 17, 27.

*Southwick vs. First National Bank* is significantly in point.

Any burden arising from any doubtful nature of the complaint rests on the plaintiff.

Clark vs Dillon, 97 N. Y., 370, 373, 374.
Southwick vs. First National Bank, 84 N. Y., 420, 429.

It is proper and fair to insist upon this Point, because the plaintiff seems to have sought, by presenting his claim in this form, instead of suing openly and directly for the $8,000 and $7,000, to secure to himself some technical advantage, and to avoid or obscure the burdens which would rest upon him in such a suit.

## POINT III.

**The plaintiff, to charge the defendant, must affirmatively prove that the charge of $15,012.50 was without authority and improper, and he has failed to do so.**

This is so even if all the credits appearing in the statement of account correctly represent deposits actually made with such intent and in such manner that the ordinary contract in favor of the Elmira Bank as a depositor arose thereon.

The allegation of a balance in plaintiff's favor is contained in the amendment of the complaint, made by the order of October 31st, 1899 (p. 9), and, by the

terms of the order, is deemed controverted (p. 10). This fact, essential to plaintiff's case, is put in issue, and must be proved. It is part of his case, and the burden of proving it is upon him, and *remains with him throughout the case.*

Whitlatch vs. Fidelity Co., 149 N. Y., 45, 50.
Kay vs. Met. Street Ry., 163 N. Y., 447, 453.

By the mode adopted by him of proving his case by introducing in evidence the statement of account the plaintiff peculiarly charges himself with the burden of affirmatively disproving this item. The entire admission, the part that discharges, as well as that which charges, the defendant is in evidence.

Insurance Co. vs. Newton, 22 Wall., 32, 35.
Grattan vs. Metropolitan Ins. Co., 92 N. Y., 274, 284.

In *Wheeling Bridge & T. Ry. Co. vs. Franzheim (93 Fed. Rep., 617)*, the plaintiff's only substantial evidence was a statement of account rendered by the defendant, which showed a balance in defendants' favor, and the Court said (p. 620):

> "There was, in fact, nothing for the jury to act "upon except the account, and the whole of that "was before them, and it was their duty to con- "sider *the whole of it.* * * * *The burden was* "*upon the plaintiff to the end* to prove its case "by a fair preponderance of evidence."

And at page 619 quoted from 2 Tayl. Ev., Sec. 726:

> "Where a defendant has rendered a debtor "and creditor account to the plaintiff, which the "latter *produces* in proof of his demand, it will "be equally admissible in evidence of the de- "fendant's set-off, though the plaintiff will be "generally at liberty, while relying on the creditor "side of the account, *to impeach* items which ap- "pear on the debtor side."

By his mode of proof it became (if not so already) a, *part of his case* to prove the impropriety of the $15-012.50 charge.

The plaintiff did not prove that the charge of $15,-012.50 was without authority and improper.

The sole evidence of plaintiff as to this charge was the bare check itself for $15,012.50, with the endorsements thereon. There is *no scintilla of evidence* that Bush had not authority from his bank to make the endorsements.

Bush may have had authority or right from his bank to make the directions contained in the endorsement, or they may have been subsequently ratified or accepted by his bank.

The evidence as to his authority to draw drafts for his own benefit, which is hereafter discussed, *is also evidence of his authority to endorse this direction*, which is in effect a draft.

> " An acceptance or promissory note thus payable
> " is if the party is in funds, that is, has the
> " amount to his credit, equivalent to a check, and
> " is in effect an order or *draft* on the banker in
> " favor of the holder for the amount of the note
> " or acceptance."
>
> Ætna Bank vs. Fourth National Bank, 46 N. Y., 82, 88.

The Chase Bank is not trying to *enforce* a claim based upon an act done by the cashier. If it were, it must, of course, prove the authority, as a part of its case. Here money has been paid and charged upon an order given by the cashier and his bank is affirmatively attacking that transaction. It must prove, as part of its case, that the act was done without authority or other right or ratification.

The burden of proof often requires a party to prove a negative.

> Colorado Co. vs. U. S., 123 U. S., 307, 317-319.

Stokes vs. Stokes, 155 N. Y., 581, 586.
Roberts vs. Chittenden, 83 N. Y., 33, 35.
Gildersleeve vs. Landon, 73 N. Y., 609, 610.

In the last case it was held necessary to prove a negative in order to overthrow part of an admission relied on.

If the endorsement was without authority, Bush was using bank funds for himself, and was guilty of a crime. The presumption should be against such a crime.

Colorado Co. vs., U. S., 123 U. S., 307.

The bare fact that the check was used to pay Bush's note would not be enough to prove that he was without the authority to make the indorsement. The nature of the rule regarding acts of agents for their own benefit is discussed below (Point XI.). It is not the law that an agent *cannot* have such authority. It was quite possible that Bush had authority to make the endorsement. There is no evidence of the state of his account at the Elmira Bank. It may have been good for this check, which may have been charged against it, or may have been otherwise settled, either by himself, or by others on his behalf. There may have been many reasons why authority to so draw upon the Elmira Bank's account either in this matter particularly, or in similar circumstances generally, should have been given. The Court and jury *certainly did not know that it was not.*

The fact that the check was *certified*, or that the endorsement was *made at a place other than the Elmira Bank* is immaterial.

In Merchants' Bank vs. State Bank, 10 Wallace, 605, 650, the Court say :

> " It is objected that the checks were not certified
> " by the cashier *at his banking house.* The pro-
> " vision of the act of Congress as to the place of
> " business of the banks created under it *must be*

" *construed reasonably.* The business of every " bank, away from its office—frequently large and " important—is unavoidably done at the proper " place by the cashier in person, or by corre- " spondents or other agents * * * *There is* " *no force in this objection.*"

An endorsement made by a cashier on the street after banking hours is binding.

Bissell vs. First Nat. Bk., 69 Pa. St., 415 :

Representations by a cashier to a purchaser of a note endorsed by him as cashier which were made at a city other than that in which the bank was, were held binding on the bank, and an objection that the representations were not made at the bank was said to be *without merit.*

Houghton vs. First Nat. Bk., 26 Wis., 663, 670 :

Whatever objection there might be to the certification, *it was not acted on*, and from the nature of the transaction it could not have been intended to be acted on, the direction to pay at the Chase Bank being sufficient for all the purposes intended. It is therefore not material to the case. It has been suggested that the certification was a crime; but it has been held that in the crime of unlawful certification more is necessary than the mere writing of the words; it must be so done as to create an obligation of the bank, and the violation must be willful, which means not merely with knowledge, but with evil intent.

Potter vs. U. S., 155 U. S., 438, 444, 446.

Under the circumstances of this " certification," even if it were material to the case, and had had any effect upon the transaction, we think the Court is not in a position to say that the act was criminal.

Plaintiff has therefore failed to impeach the charge

for $15,012.50, or to prove that it was unauthorized and improper, and has therefore failed to prove that there is any balance due to him from the defendant.

## POINT IV.

**The plaintiff cannot, herein, question any of the facts or transactions leading up to or constituting the deposit of the $8,000 or $7,000.**

His claim, as presented by him, *depends upon* these deposits. Without them there is no basis for a recovery; no obligation on the part of the Chase Bank to pay. His evidence of this obligation is the credits in the statement of account, and these two items among those credits are essential to his claim. If they are excluded, there is nothing due him, except the $12.50.

His claim, *as he presents it*, therefore *affirms* and *adopts* the transactions involved in these deposits; and in this suit he cannot question their validity or legal propriety.

> In Wilson vs. Pauly, 72 Fed. R., 129, it was held that though a bank might have resisted a claim on the ground that the president had no authority, " here, *by bringing suit* upon the notes, the *agency* " by which they were obtained is *adopted* in an em- " phatic way, and the act is ratified. * * * In " an action to enforce *against the principal* a con- " tract made by an agent acting without authority, " but which has subsequently been ratified by " the principal, it is necessary to show that the " ratification was made with knowledge of the " circumstances. But when the *principal brings*

" *the action*, and the circumstances are proven in " defense, he is not entitled to judgment in disre- " gard of them.' "

In this case plaintiff will not deny the fullest knowledge of the fact. Such knowledge is apparent from the whole course of the case, from the depositions taken by him both before the last trial (of Bush and Coykendall) and before the first trial (of Edison and Batterson).

The decision in 104 Federal Reporter, 214, shows that the facts were fully understood and litigated in the first trial.

In the case as now presented, therefore, the question of the authority of Bush in the matter of the cash or the checks disappears. *Any argument which denies the right of Bush to make the deposits bars the right of the plaintiff to recover on those deposits.*

All that was prior to the deposit, and necessary to it, is affirmed. The plaintiff, therefore, affirms the taking of the cash and drawing of the draft by Bush, and cannot in this action question those acts.

Moreover, in choosing to stand upon and adopt the deposits, knowing the facts, plaintiff necessarily adopts them as they were made, and upon the *terms* and understanding upon which they were made. If what was done was *not*, taken in its whole effect, a deposit of these sums upon a contract such as is involved in what is known as a deposit account, then the basis upon which he has elected to sue in this action is gone, and he can not recover herein.

Plaintiff knew what the transaction was. If he wished to disaffirm it, he should have taken some other form of action.

## POINT V.

**In fact there was only charged against the defendant in the transaction of May 5th the $12.50, which with interest was awarded to plaintiff by the jury.**

The evidence of Porter, corroborated by that of Voorhees, is uncontradicted and fully explains the transaction of May 5th and the entries made in relation thereto. It shows that on May 5th $8,000 in cash was received from Bush and in form entered under that date to the credit of the Elmira Bank; at the same time a draft for $7,000 on the Quaker City Bank of Philadelphia was similarly received, and the amount thereof was on the 8th day of May paid by the Quaker City Bank to the Chase Bank and in form entered under that date to the credit of the Elmira National Bank; the check for $15,012.50 was on May 5th received from Bush and in form charged against the Elmira Bank; and the delivery and credit of the $8,000 cash and the $7,000 draft, and the proceeds of it, and the drawing and charging of the $15,012.50 check, were all parts of a single transaction for a single purpose, and the net result of that transaction, *as made and as intended*, was simply to charge the Elmira Bank with $12.50.

So far as this action for the balance of the account is concerned it is immaterial what the credit items of $8,000 and $7,000 represented. It is not necessary to the defense to show that they represented anything. The material fact is that as *against a charge* of $15,012.50, as a part of the same transaction, the Chase Bank *gave a credit* of $15,000. The Elmira Bank, claiming the benefit of that credit as a deposit, cannot question the right or authority of the person making the deposit; and it cannot, while claiming the benefit of part of the transaction, discard the other part. It

must take it as a whole and upon the terms upon which it was made, or abandon its claim as a claim for the deposit.

Therefore, if the charge by reason of the form in which the check was drawn and endorsed, or the lack of the right or authority of the cashier to make that endorsement, is an improper charge, the amount of the charge whose impropriety is thus shown is only the amount of the *net charge* made in this transaction, that is to say $12.50.

## POINT VI.

### Plaintiff did not prove that the $8,000 and $7,000 were in fact so deposited as to charge the defendant with a contract to pay them to the plaintiff.

If it is true that the items of $8,000 and $7,000 credited in the account never were credited with an intention of *thereby admitting an indebtedness* to the Elmira Bank, but *merely to offset* and make good this very counter-charge of $15,012.50, then certainly the whole case falls; falls without regard to whether the $15,012.50 is properly chargeable against the Elmira Bank or not because the *admissions on the credit side of the account* of these items are the only basis for any recovery in the case.

Now, the testimony shows that these two items on the credit side of this account, two apparent admissions of indebtedness to the plaintiff aggregating $15,000, were never intended as such, and did not represent a transaction in which such an indebtedness was created. The currency and the Philadelphia check which are the basis of those two entries were not offered as deposits by the Elmira National Bank or for it, they were not supposed by defendant to be-

long to it. They were not entered as they were with any intention of establishing or admitting the relation *of debt to the Elmira Bank*, or of giving it any right to draw against them. They were put there merely to be withdrawn by the simultaneous $15,012.50 check, to authorize, justify and make good that transaction. As explained by the evidence, they have no effect as *admissions of indebtedness* to the plaintiff.

The statement of account is not sued on or presented as an account stated. No suggestion of that has ever been made. It has never been accepted. It stands simply as *evidence*, open, like any other evidence, to explanation or contradiction.

An action for a balance of deposit is an action upon a contract of the depositary bank to pay to the depositor, or on his order, the amount deposited, and the contract arises when sums of money are deposited by the depositor or for his benefit, with the intent, or upon the understanding or agreement, that they shall be so repaid as a part of the sums covered by the deposit account.

It is a contract of debt.

Marine Bk. vs. Fulton Bk., 2 Wall., 252, 256.
Nat. Bk. vs. Ins. Co., 104 U. S., 54, 66.
Bk. of Republic vs. Nat. Park Bk., 10 Wall., 152, 155.

The plaintiff was, therefore, bound to prove that the items on which he relies to make up the credit side of the account were deposited, and in such manner that this "deposit account" agreement arose in relation to them.

In the order amending the complaint (pp. 9, 10), in which is the only allegation of a balance due, it is provided that the allegation shall be deemed controverted. The denial in the answer (pp. 11, 12) of the allegations that the $15,012.50 was charged in the account against the Elmira Bank, and retained out of its funds, in effect raises the same issue. The ambiguity of the allegations made it necessary to make the denial particular

in its statements, so that it should not be misinterpreted, or broader than the facts, but the *issue is made by the denial of the allegations of the complaint.*

As to the $8,000 and $7,000 items the transaction really was that they were "deposited" on special terms, for a special purpose, to be carried out as part of the same transaction, and, in fact, and in legal effect, the "deposit account" contract never attached to them. As to those items the *plaintiff must discharge his burden of proof.*

The only evidence offered by plaintiff to prove that any contract or liability was entered into by the Chase Bank with reference to them was the statement of account (Exh. B, p. 20), which he introduced in gross—all the items, both of credit and debit—in no way distinguishing from the other credit items, or calling attention to, either of the $8,000 and $7,000 credits, which upon his case simply stood as two among numerous credits, together leading up to a resulting balance.

The statement on the face of the account was undoubtedly *prima facie* evidence that these items were so deposited. But the actual facts of the transaction were testified to by Porter and Voorhees, and there is no other evidence tending to the contrary of their statements. There can be no practical question that their evidence is true. Plaintiff's counsel took the deposition of Bush, the only other party to that transaction, and did not attempt to elicit from him anything contradictory. The story of Porter and Voorhees is definite and complete, and establishes beyond a question that the delivery and deposit of the $8,000 and $7,000 were made by Bush for the purpose of paying his note, and of paying it through the medium of the $15,012.50 check, which was at the same time drawn, delivered and charged, and upon that understanding; that they were thus made for a limited, definite purpose, and not for the general purpose nor under the general contract that the plaintiff should pay those moneys on the order of the Elmira Bank as a part of

its deposit account, but for the purpose and with the understanding that they should provide for the immediate drawing of that check. The deposit was made for this purpose, and was necessarily subject to it. It was made on no other terms, and, if it stands at all, it must stand on those terms.

It will clear the case of some confusion and obscurity if we separate out some elements which do not tend to charge the defendant with a liability.

If a stranger to the Elmira Bank had made a deposit to the account of the Elmira Bank in form, and in form immediately, in pursuance of a previous understanding, drawn against it, and the Chase Bank had recognized that draft and entered the items in the Elmira Bank account, there would be nothing in the transaction which would entitle the Elmira Bank to claim the amount deposited. There would have been no contract arising in the transaction to pay that money on the order of the Elmira Bank. If Bush, having money unquestionably his own, had deposited it at the Chase Bank to the credit of the Elmira Bank, and, in pursuance of a prior understanding, immediately drawn it out, there would, similarly, have been nothing in the transaction to entitle the Elmira Bank to claim from the Chase Bank the amount so deposited. The "impropriety," if any there be, in so *trifling with* the account of the Elmira Bank, and the annoyance or inconvenience to that bank of inquiring about the items consequently appearing in the statements rendered to it, are immaterial to the question. They do not supply any contract for the payment of the money to the Elmira Bank.

It is therefore clear that if the Elmira Bank or its Receiver had any cause of action it must have arisen *not* upon the fact of the *deposit and the draft against it*, but upon some *different* or additional state of circumstances.

No reference to any such circumstances is made in the complaint, nor in the plaintiff's case.

## POINT VII.

**Even if not restricted by the form of the action, plaintiff could not recover the $8,000 of cash.**

This sum was received by the bank for the purpose of payment upon the note which it held. Porter testifies that at the time of its receipt he believed that it was Bush's own money and he had not the slightest reason to doubt Bush's right to do what he did in the transaction of May 5th (pp. 26, 32). The question of the good faith of the bank in receiving the money was left to the jury and decided by them in favor of the bank, and upon the common rules of law relating to receipts of cash no recovery of this sum can be had.

Goshen Nat. Bk. vs. State, 141 N. Y., 379, 385.

Holly vs. Missionary Soc., 180 U. S., 284, 293–4.

Nassau Bk. vs. Bk. of Newburgh, 32 N. Y. App. Div., 268, 270; 159 N. Y., 456.

## POINT VIII.

**Even if not restricted by the form of the action, plaintiff could not recover for the $7,000 received upon the draft.**

*(a)*

This sum was received in money not from the Elmira Bank, but from the Quaker City Bank, of Philadelphia, and if the draft or order upon which it was paid was not in fact the order of the Elmira Bank the Quaker City Bank had the right to recover that money from the Chase Bank. There is no evidence that the

Elmira Bank has paid the Quaker City Bank or given it credit for the payment.

*(b)*

A claim to recover this $7,000 as improperly paid to the Chase Bank upon this draft would be an affirmative claim by the plaintiff to recover back money already received upon an order made by one claiming authority, and not a case in which the Chase Bank was suing upon or trying to enforce the draft. It would therefore be no part of the Chase Bank's case to prove the authority; but the whole *burden* of the case, including the burden of *alleging* and *proving* such want of authority would be on the plaintiff. In such case it is very clear that this burden is upon the plaintiff (see the reasoning under Point III.) He must affirmatively prove this lack of authority and he has made no pretense of such proof.

The difference of situation between one suing to enforce a draft and one suing to *recover money already paid* on it is insisted on in *Southwick vs. First Nat. Bk., 84 N. Y., 420, 436-7.*

*(c)*

Authority to draw the draft (Point XI.) and the good faith of the bank in taking it (pp. 26, 32) were proved.

## POINT IX.

**The plaintiff having retained, until the time of the trial, the $15,012.50 check, cannot recover.**

The $15,012.50 check a copy of which is contained in the complaint, page 7, was drawn by Bush, and

if it was not properly payable and charged at the Chase Bank as directed in the endorsement, then Bush was individually liable upon it. It came into the hands of the Receiver of the Elmira Bank on or about June 6th, 1893 (pp. 20, 21). There is no suggestion or evidence that it was ever surrendered or offered to the Chase Bank until the first day of the second trial of this case on October 22d, 1900 (p. 21), when it was in the hands of plaintiff's counsel. If it had been surrendered to the Chase Bank, that bank might have obtained the amount thereof from Bush. Moreover, without offer of such surrender no effective demand of payment upon the Chase Bank could have been made.

Demand is necessary before suit on a deposit account.

Paine vs. Gardiner, 29 N. Y., 146, 155.
Pardee vs. Fish, 60 N. Y., 265, 270.
Thomas vs. Bk. of Brit. N. Am., 82 N. Y., 1, 8.
Bk. of Brit. N. Am. vs. Mer. Nat. Bk., 91 N. Y., 106, 110.
Munger vs. Albany Bk., 85 N. Y., 580, 587.

## POINT X.

### Proof of the authority of the cashier to draw the cashier's draft was not necessary.

By his form of action, in which he claims under this draft, plaintiff has barred himself from disputing its validity (Point IV.). But if he had not, the authority of the cashier is established.

In Point XI. the rule of presumption or construction against the authority of an agent to act for his principal when he is himself concerned is discussed at length. That rule is one adopted by the Courts from considera-

tions generally supporting such presumption or construction, but it is not necessarily of universal application and free from exception any more than other rules of presumption or construction; and if the notorious and public usages are such as, in a particular class of cases, tend to support a different presumption or construction, the Courts are free to so declare.

Cashier's drafts are used in great quantities throughout the financial world. They are freely and unhesitatingly accepted; and it is desirable that they should be. They are one of the commonest and most important means of making payments in distant places. That they have generally been so used by cashiers as well as by others does not admit of practical doubt. They are issued by banks in regular course of business, and as a matter of course upon proper consideration. Their issue does not involve questions of judgment or discretion. There seems to be no reason why banks should require their cashiers to resort to other banks for such drafts, or to believe that they do so require or expect. That would be detrimental to the standing of the cashier. Bank cashiers customarily, and certainly with the consent and approval of their banks keep deposit accounts with their banks, and either directly or through their subordinates manage and supervise those accounts and pay checks thereon. It may well be considered that, being allowed to be thus customers of the bank, it is intended and implied that they shall have the ordinary facilities and advantages of customers. There is no reason to deny the right to use cashiers' drafts, for fear that they may improperly take them without consideration, which would not also forbid their having deposit accounts, for fear that they might be overdrawn. The right of cashiers to act in their own behalf in some matters certainly is intended and admitted, and legally exists—courts certainly will recognize it, and deem it implied without proof. It is not necessary to deny it in any of the ordinary matters customary in dealings

with depositors and not of a nature involving discretion. As to cashiers' drafts the use and custom have been such that courts are well justified in concluding that there is *no presumption* that the issue of them to the cashier, on the same terms as to customers in general is *not* intended to be included in his general authority.

A court of high authority, and in the State where the largest part of our financial and banking transactions occur, has declared, deliberately and with iteration, that in view of the common and notorious general public use of cashier's drafts they *should be deemed* within the general authority of cashier when drawn to his own order.

Goshen Nat. Bank vs. State, 141 N. Y., 379, 387.

It is true that the Court in this case considered that the authority of the cashier to draw drafts in his own favor was expressly proved; but the position that such proof was unnecessary, and that the act was included within his general powers was deliberately taken; and this is emphasized by the fact that PECKHAM, J., who wrote the opinion, said of this case, in writing the opinion of the Court in

Bank of N. Y. vs. Am. Dock & T. Co., 143 N. Y., 559, 565.

> " We also held, for reasons therein stated, that
> " there was a difference in the case of bank or
> " cashier's drafts from most other cases of agency."

Both of the opinions were unanimously concurred in.

Some of the United States Courts seem to have differed from the conclusions of these cases.

Anderson vs. Kissam, 35 Fed. Rep., 699.
Samson vs. Beard, 94 Fed. Rep., 30.

But the question has not yet been decided in this Court, and on the appeal in the case of *Anderson vs.*

*Kissam*, which was decided in this court on another ground, this Court pointedly intimated that at least it was not ready to concur with the Circuit Court upon this point.

Kissam vs. Anderson, 145 U. S., 435, 441.

In addition to the general authority implied from the cashier's position, there was in the present case the by-law expressly providing for the signature of all drafts by the president or cashier (p. 62).

## POINT XI.

**Abundant evidence was given by the defendant to prove the authority of the cashier to draw such draft, and the verdict of the jury is decisive.**

The burden of proving that this sum, paid to the Chase Bank through the transaction of May 5th, was, originally or ultimately, paid out of the property of the Elmira Bank, *and without its authority*, was on the plaintiff; provided that in this action he is permitted to question that authority and to prove those facts (see Points II., IV., V.). But the defendant has submitted evidence in support of that authority, and the jury has passed upon it.

The rule which restricts the powers of agents to act for their principals in transactions in which they are interested upon the other side is a general rule of construction in the law of agency, not arising especially out of any relations of officers to corporations in general or to banks in particular.

It has been held that this rule should not be applied to the case of cashiers' drafts (see Point X.).

The rule is one not of power but of construction. It has never been held that authority *cannot* be given to an agent to act where he is individually interested. The cases constantly recognize that it may be given. In fact, it is the rule, frequently asserted, that where an agent does act in such cases his act is not void, but is *only voidable* at the election of the principal.

Thomas vs. Brownsville R. R. Co., 109 U. S., 522, 524.
Twin Lick Oil Co. vs. Marbury, 91 U. S., 587, 589.
Hammond vs. Hopkins, 143 U. S., 224, 251.
Duncomb vs. N. Y., N. H. & H. R. R., 84 N. Y., 190, 199.
Jessup vs. Ill. Cent. R. R., 43 Fed. R., 483, 503.
Coe vs. East. & W. R. R., 52 Fed. R., 531, 543.

The rule is simply one of *construction* of powers, and the *extent* of it is that, where nothing appears but a power given in general terms to an agent to act for his principal, in the absence of special evidence of intention, it will *not be held to extend* to acts in which the agent is interested on the other side, and that, where a power is implied from the existence of an office or other relation, such implied power will not be held to extend to such case.

The nature of the rule quite clearly appears in the opinion of PECKHAM, J., in *Bank of New York vs. American Dock & T. Co. (143 N. Y., 559, 563, 564):*

> "We come then to the consideration of the "proper *construction* of the by-law. In the light "of the *general rules of law upon the subject of* "*principal and agent* we are of the opinion that "the by-law or resolution in question ought not "to be *construed* as clothing either the president "or the treasurer with any authority to issue "receipts to *himself* for cotton, which in truth "had been deposited by him. It is an acknowl-"edged principle of the law of agents that a

> " *general power* or authority given to the agent to
> " do an act in behalf of the principal *does not*
> " *extend* to a case where it appears that the agent
> " himself is the person interested on the other
> " side. *If* such a power is intended to be given,
> " it must be expressed in language so plain that
> " no other interpretation can rationally be
> " given it."

The extent of the rule is likewise indicated in the opinion of WAITE, C. J., in *West St. Louis Bank vs. Shawnee County Bank, 95 U. S., 557, 559*, where he says :

> " Ordinarily the cashier, being the executive
> " officer of a bank, is *presumed* to have, in the
> " absence of positive restrictions, all the power
> " necessary for such an officer in the transaction
> " of the legitimate business of banking. * * *
> " But certainly he is not *presumed* to have power
> " *by reason of his official position* to bind his bank
> " as an accommodation endorser of his own
> " promissory note. Such a transaction would not
> " be within the scope of his *general powers*, and
> " one who accepts an endorsement of that char-
> " acter, and contest arises, must *prove actual*
> " *authority* before he can recover. The very form
> " of the paper itself carries notice to a purchaser
> " of a *possible want* of power to make the endorse-
> " ment, and is sufficient to put him on *his guard*."

The existence of such a power was held to have been established in

> Hanover Bank vs. American Dock & T. Co., 148 N. Y., 612.
> Goshen Bank vs. State of New York, 141 N. Y., 379.
> Reynolds vs. Bk. of Mt. Vernon, 6 App. Div., 62, 68; affirmed on opinion below, 158 N. Y., 740.

It is clearly recognized that such power *may* be given in *Anderson vs. Kissam, 35 Fed. Rep., 699*, in which the jury were instructed (p. 702) that they might find upon the evidence that the cashier was permitted by the directors of the bank to draw such checks for his own use, and WALLACE, J., on the appeal said (p. 704):

> "The party dealing with him must take notice
> " of his want of authority and cannot treat it as an
> " obligation of the principal *unless* he can prove
> " the existence of some special and extraordinary
> " authority on the part of the agent."

And again (p. 705):

> " If the circumstances were sufficiently notori-
> " ous and peremptory * * * they would afford
> " *sufficient evidence* of Warner's *authority* to use
> " the funds of the bank as he did, and would have
> " justified the defendants in relying upon the os-
> " tensible authority evinced by the acquiescence
> " and recognition of the directors."

And again (p. 706):

> " When he has information that the agent who
> " has made the paper has made it in the name of
> " the principal for his own use he must be prepared
> " to show that special *authority in that behalf has*
> " *been delegated* by the principal and cannot rely
> " upon the implied authority of the agent to make
> " such paper in the ordinary business of the
> " principal."

In that case the question was left to the jury and the jury found that no such authority was given.

The possibility of such authority being given is also recognized in *Lamson vs. Beard, 94 Fed. Rep., 30*. Three cases are decided together under this head. In one of them the jury, and in the other two the Court

without a jury, found as a matter of fact that the evidence did not show such authority, but WOODS, J. (on the appeal), says that (p. 39):

> "The inquiry of the takers of the draft drawn "by the president for his own purposes, however "made, was *whether* Cassatt had *authority* to draw "drafts of the bank upon funds of the bank in "the possession of its correspondents for use in "his *individual transactions.*"

And the possibility of the authority was recognized in the decision of the Circuit Court of Appeals on the appeal after the former trial in this case (104 Fed. Rep., 214), in which the Court say (p. 216):

> "The question turned, not upon an express au- "thority upon the part of Bush, but upon implied "*authority* which was to be *inferred* from the "alleged acquiescence of the Elmira Bank in his "*prior assumption of authority.* That, in the *ab-* "*sence* of any authority in a cashier to draw "cashier's *drafts to his own order*, in payment of "his individual debts, the person who receives "such a draft in payment of the cashier's individual "debt takes the *risk* of being obliged to repay "the draft to the bank was not denied."

At page 217 the Court say that the charge of the trial Judge that *such authority might be proved* by a course of previous transactions *was correct.*

In *Park Hotel Co. vs. Fourth Nat. Bk., 86 Fed. R., 742*, the Court say:

> (P. 744:) "Such a note (of the corporation to "the order of the president and signed by him) is "a *danger signal* which the discounter or purchaser "disregards at his peril. It is notice to him that, "if it is contested, he cannot recover upon it under "any *general* authority in the agent, or at all, "*unless* he proves that the agent was specially

" authorized to make that particular transaction,
" *or to make contracts of the corporation with*
" *himself.*"

(P. 746:) The form of the note gave the bank
" notice that Hogeboom had no power to make it
" under his *general authority*, and that, if the
" corporation contested it, it must discover and
" prove *special power* in him to do so."

If we waive the special considerations as to cashiers' drafts asserted in the Goshen Bank case, the result of the rule then is that, as a matter of construction of powers, one upon whom the burden is to prove the cashier's authority for a draft to his own order cannot rely simply upon a general authority to the cashier to draw bank drafts, or upon his general powers implied from his mere office as cashier; but he must in some way go farther and show that he has authority from the corporation or its board of directors to issue such drafts in his own matters.

## Mode of Proof of Power.

The cases cited above show that such a power may, like any other power, be proved, not necessarily by showing directly any express written or oral grant of power, but also by *circumstantial evidence*, such as the *exercise* of the power with the *acquiescence* of the principal.

Inasmuch as the rule is a rule of construction of the powers and not a rule of law that the principal *can* give the agent no such power, we take it that evidence of the exercise of the power by the agent may be effective in four separate ways.

*First.* The instances of the exercise of the power may have occurred to the knowledge of a party who relies on a subsequent exercise of the power, in which he may be protected by *estoppel*.

*Second.* Where there is a grant of a *general power*, the instances of the exercise of the power for the

agent's benefit may establish a *construction* of this power broader than that which otherwise the Court would give to it. In other words, the power being in its *terms* broad enough to cover the case of acts for the agent's benefit, the presumption that would otherwise obtain, that it was *not intended* to cover acts for the agent's benefit may be overcome by proof of acts done under the power, which show that it *was the intention* of the parties that the power should have a broad effect, according to its terms.

*Third.* The acts of exercise of the power are *evidence* from which the *jury may infer* that the power has been granted.

*Fourth.* The acquiescense of the corporation in the exercise of the power may *constitute* a grant of the power.

The jury has the right to consider the acts in exercise of the power with reference to their effectiveness in establishing any one of these four branches.

That a bank cashier has a general power to sign drafts is, of course, unquestioned.

Moreover, the by-laws of the Elmira Bank (Record, p. 63, provide) :

> " SECTION 25. All contracts, checks, *drafts*, &c.,
> " and all the receipts for notes received from
> " the Comptroller of the Currency shall be signed
> " by the *president or cashier*."

There was, therefore, a general power in the cashier of the Elmira Bank, both by reason of his office and by express provision of the by-laws, to sign drafts. The defendant, in addition, has shown a long-continued exercise by the cashier of the power to sign such drafts in his own favor.

The drafts actually proved are of varying amounts. Same of them are quite small, and this latter fact is

much insisted upon by the plaintiff. The size of the draft seems, however, to be immaterial. What we are confronted with and are asked to meet is simply the principle that a general authority will not be construed to allow *acts in the agent's own behalf.* That is the exception which the law construes into the grant of power. What we are obliged to show is that in the case of this cashier of the Elmira Bank *that exception did not prevail;* that acts done in his own behalf were *not excluded* from the scope of his authority. It is a question, *not of particular amounts,* but of *general principle* as to his authority; and the *principle* is established as soon as it is demonstated that such drafts of any size were issued by the cashier with the acquiescence of the Board of Directors. When it is established by instances of the exercise of the power that the right to act in his own case is not excluded from the authority of the cashier, how can the Court say that nevertheless he cannot act in his own case above certain figures? And how can it fix those figures? Is it reasonable to suppose that a board of directors would trust him to act in his own case but only up to some limit; and, if so, would they not expressly establish the limit on their records?

In *Colorado Springs Co. vs. American Pub. Co., 97 Fed. Rep., 843,* contracts amounting to over $200,000 for advertising were executed by the manager, and the question was raised of the manager's authority. He had no such authority by the by-laws or by virtue of his office. It was suggested that, as it was not shown that he had ever made contracts of *such importance or magnitude,* the evidence was insufficient to support a finding of his authority, but the Court says (p. 851):

> " We think, however, that it was *not essential*
> " to the submission of the cause to the *jury* that
> " the plaintiff company should have shown that
> " Parsons had theretofore executed contracts of
> " a precisely similar nature, involving the ex-
> " penditure of the same amount of money."

In *Leroy & Air Line R. R. Co. vs. Sidell, 66 Fed. Rep., 27, 31,* , this Court quotes with approval from *Bank vs. Norton, 1 Hill, 502*, as follows :

> " It is *not necessary*, in order to constitute a
> " general agent, that he should have done before
> " an act the *same* in specie with that in question.
> " If he has generally done things of the *same gen-*
> " *eral character and effect* with the assent of his
> " principal, that will be enough."

It is familiar law that the authority of an officer of a corporation to do an act need not be proved by the books of the corporation but may be proved by circumstantial evidence, such evidence being usually evidence of the exercise of the power with the acquiescence of the directors or officers.

*In Mining Co. vs. Anglo-California Bank*, 104 *U. S.*, 192, 194, 195, the Court say :

> " It is settled that the existence of such au-
> " thority in subordinate officers may in the ab-
> " sence of express statutory prohibition be shown
> " otherwise than by the official records of the pro-
> " ceedings of the Board. It may be established
> " by proof of the course of business between the
> " parties themselves, by the *usages and practice*
> " which the company may have permitted to grow
> " up in its business, and by the knowledge which
> " the board charged with the *duty* of controlling
> " and conducting the transactions and property
> " of the corporation had or *must be presumed* to
> " have had of the acts and doings of its subordi-
> " nates in and about the affairs of the corporation."

In *Bell vs. Hanover National Bank*, 57 *Fed.*, 821, 822, LACOMBE, J., citing this case, substantially repeats its language as follows :

> " Authority to make it (a contract) may be es-
> " tablished by proof of the course of business, by

" the usages and practices which the directors
" may have permitted to grow up in the business
" of the bank and by the knoweledge which the
" board of directors must be presumed to have
" had of the acts and doings of its subordinates
" in and about the affairs of the corporation."

In *Merchants' Bank vs. State Bank, 10 Wallace, 605*, the Court say, at page 644, that it

" should have been *left to the jury* to determine
" whether from the evidence as to the powers
" exercised by the cashier with the knowledge
" and acquiescence of the directors and the usage
" of other banks in the same State, it might not
" be fairly inferred that Smith had authority to
" bind the bank by the contract which he made."

And at page 649, as to the power of the cashier to certify:

" The questions whether the requisite authority
" was not inferable * * * should in this con-
" nection also have been *left to the jury*."

In *Martin vs. Webb*, 110 *U. S.*, 7, the Court say:

" It is clear that a banking corporation may be
" represented by its cashier * * * in trans-
" actions outside of his ordinary duties, without
" his authority to do so being in writing or ap-
" pearing upon the record of the proceedings of
" the Directors. His authority may be by parole
" and collected from circumstances. It may be
" inferred from the general manner in which for
" a period sufficiently long to establish a settled
" course of business, he has been allowed, with-
" out interference, to conduct the affairs of the
" bank. It may be implied from the conduct or
" acquiescence of the corporation, as represented
" by the Board of Directors. When, during a

"series of years, *or* in numerous business trans-
"actions, he has been permitted without objection
"and in his official capacity, to pursue a par-
"ticular course of conduct, it may be presumed,
"as between the bank and those who in good
"faith dealt with it upon the basis of his authority
"to represent the corporation, that he has acted
"in conformity with instructions received from
"those who have the right to control its opera-
"tions. Directors cannot in justice to those who
"deal with the bank, shut their eyes to what is
"going on around them."

In *Nat. Bk. of Commerce vs. Atkinson, 55 Fed. R., 465, 472*, it is said that authority to the president to make a note

"may be *conferred* upon him by the Board of
"Directors, either expressly, by resolution to that
"effect, by subsequent ratification, or by acquies-
"cence in other transacrions of a similar nature,
"and of which the directors have knowledge."

In *Chambers vs. Lancaster, 160 N. Y., 342, 349*, the Court say:

"The scope of the authority conferred by the
"corporation upon its president, Mr. Treanor,
"does not appear in terms, but his authority may
"be implied from the power he was accustomed
"to exercise without the dissent of the company
"and with its acquiescence."

That the defendant has proved that there was *no dissent* from the exercise of the power is, we understand, not questioned by the plaintiff. It was proved by direct and uncontradicted evidence of the cashier.

In proving the *exercise of the power* of the cashier to issue drafts in his own behalf, not only drafts drawn to his order, but *also drafts drawn to other persons but*

*in his own business* or for his own benefit or in his own individual matters, may be shown. Though not so strong *evidence of acquiescence*, because not so directly calling attention to the interest of the cashier, they are equally *acts of exercise of the power*. The limitation on the general authority is not merely a limitation of his right to draw drafts which are on their face to his own order, but extends to all acts in which he is an interested party. The limitation arises not out of the *form of the paper* but out of the *agent's interest*.

In *Anderson vs. Kissam, 35 Fed. Rep., 699*, WALLACE, J., said (p. 704):

> "It can make no difference whether the agent
> " or officer appears to be the party to whom the
> " paper is payable upon the face of the instru-
> " ment, or whether it appears by intrinsic facts
> " for whose benefit it was made. * * * As
> " the checks were made payable to the order of
> " the defendants for Warner's individual use, in
> " legal effect they were made payable to Warner's
> " own order."

In *Lamson vs. Beard, 94 Fed Rep., 30*, the drafts were not drawn to the order of the officer, but to the order of the parties to whom he made payments (p. 39).

The *knowledge of the officers* or directors may be proved by the *presumptions* of knowledge on the part of those charged with the management of the affairs of the bank and by *any circumstances tending to make it probable* that knowledge of such acts of exercise of the power came to the notice of the officers or directors.

See the cases above quoted.

In *First National Bank vs. Mining Co., 89 Fed. Rep. 439, 444*, the Court say:

> "It is so much the *duty* of such board to know
> " what its officers do that ignorance thereof cannot

" be urged as a justification for a failure to dis-
" affirm. *That like prior transactions have passed*
" *unchallenged justifies a presumption of authority*
" *in the officer making them.*"

In *Kissam vs. Anderson, 145 U. S., 435*, the Court say :

(P. 452) : " If it be said that no officer of the
" Albion Bank knew of these deposits except
" Warner, the wrongdoer, and that he subsequently
" drew out most of these moneys in drafts to
" further other wrongs, the reply is that the other
" officers of the Albion Bank were *chargeable*
" *with knowledge* of these deposits."

(Pp. 443, 444) : " The other directors also were
" under some obligation to know the affairs of
" the bank, and it will not do to say that the bank
" can ignore the negligence of all its officers and
" profit by their omission of duty. *At the least* it
" was a question to go to the *jury* whether the
" officers of the bank other than Warner, in the
" exercise of reasonable and proper care, *could*
" have ascertained that these moneys had been
" deposited to the account of the Albion " Bank."

In *Hanover Bank vs. American Dock & T. Co., 148 N. Y., 612*, where receipts for cotton were issued by the president in his own behalf, it appeared that he had signed *two* certificates in his own behalf in 1883 and *three* more in 1886, and that *one* of them was returned and placed among the vouchers of the company, and the jury might have found from the course of business that the others were also returned, and it might have found that successive deliveries were made on some of the receipts. The Court say (pp. 622, 623):

" *Thus* it would have appeared that Stone had
" openly assumed to issue certificates to himself for
" deposits of cotton *with no evidence that any*

" *objection* had been made by the directors or in " their behalf. *The number of times* that he did so " is mainly important in its bearing upon the " probability that the directors knew that he did " it *at all.* While it does not appear that they " actually knew of these transactions, it was a " *question of fact for the jury* to say whether " they ought not to have known under all the " circumstances, as their ignorance was no excuse " unless they were reasonably diligent in super- " vising the methods and details of conducting " the business under their charge" (quoting from Martin vs. Webb, 110 U. S., 7, 15).

And, again, at pages 623, 624:

The jury " might have been *satisfied that the* " *directors knew* that Stone was actually creating " obligations against the company in his own " favor, and that the directors '*gave him authority* " *by acquiescing in its exercise.*' While the evidence " is not conclusive, it tends to establish that fact, " and we think presented a question that should " have been *submitted to the jury.* They could " reasonably have believed from all the evidence " that these acts of Stone, and the authority " assumed by him, were approved by the company, " and that he, therefore, possessed *actual authority* " to issue certificates in his own favor."

## The Question is for the Jury.

The question of the authority on all the evidence is essentially a question for the jury. This is clearly asserted in a number of the cases above cited. It is distinctly recognized, both in *Anderson vs. Kissam* and in *Lamson vs. Beard.*

In *Colorado Springs Co. vs. Am. Pub. Co., 97 Fed.*

*Rep., 843, 849*, on a similar question of authority, it was said:

> "If there was substantial testimony tending to "substantiate the affirmative of this issue, then "*as a matter of course the case was properly sub-*"*mitted to the jury.*"

We have found no case, on any facts, in which it has been held that that question should not have been submitted to and decided by the jury, excepting the former appeal in this case.

The trial upon which the present appeal is based was held before Judge SHIPMAN, who wrote the opinion on the appeal to the Circuit Court of Appeals from the judgment on the first trial (104 Fed. Rep., 214). The case was tried with great care and thoughtfulness by him, with constant reference to the opinion on the former appeal. The question of the direction of a verdict for the $7,000 covered by the draft on the Quaker City Bank was taken under advisement by him on adjournment for the day and decided by him after mature deliberation the next day, when he decided that the matter should be left to the decision of the jury.

It is the settled law of the United States Courts that the *right* to have questions of fact submitted to the jury is one that should not be abridged; that in all cases of doubt, the *doubt should be resolved* in favor of submitting the question to the jury; and that it is only where there is no possibility within reason of any determination other than that which most commends itself to the Court that the question can be taken from the jury.

Nyback vs. Champagne Lumber Co., 90 Fed. R., 774, 776.
Richardson vs. Swift & Co., 96 Fed. R., 699, 700.
Cox vs. Robinson, 82 Fed. R., 277, 282-3.
Chicago, G. W. Ry. vs. Price, 97 Fed. R., 423, 428.

Ry. Officials Assn. vs. Wilson, 100 Fed. R., 368, 370.
Standard Ins. Co. vs. Thornton, 100 Fed. R., 582, 584.

It is the settled law of this Court that where the trial and Appellate Courts have concurred upon a question of fact the Court will accept their decision, except where *clear error* is shown.

Brainard vs. Buck, 184 U. S., 99, 105.
Busch vs. Jones, 184 U. S., 598, 604.

Respect is due to the decisions upon questions of fact of those judicial agencies constituted for the purpose of arriving at them.

Two juries on successive trials have considered the evidence in this matter and concluded that the cashier of the Elmira Bank did have authority to sign drafts in his own favor. Two Judges have considered that there was at least enough evidence to require the submission of this question to the jury. It is difficult under these circumstances to say that no reasonable man could find room for the decision which these juries have reached.

In *Lunt vs. London & N. W. Ry.* (*L. R., 1 Q. B.*, 277), BLACKBURN, J., says, at page 281:

> "When a *second jury* have affirmed a previous "verdict, the court never interferes except in a "very strong case, almost amounting to the mis-"carriage of justice."

And LUSH, J., says, at page 288:

> "Although I should have come to a different "conclusion, I agree that after *two juries* have "come to the same conclusion, we ought not to "send the case back for a third trial."

## Effect of Notice from Form of Draft.

Upon the most adverse authorities, the *only effect* which the fact that this draft was drawn to Bush's order or used in his business could have upon the Chase Bank was to give it *notice* of a "*possible want of authority*" and put it to the *danger*, but not the certainty, of such a want of authority and the risk of whatever the fact should actually prove to be with regard to the existence of such authority.

West St. Louis Bank vs. Shawnee Co. Bank, 95 U. S., *supra*, p. .
Beard vs. Milmine, 88 Fed. Rep., 868, 873.

This is fully recognized in *Anderson vs. Kissam, 35 Fed. Rep., 699*, where the question of authority was left to the jury (p. 702), and on appeal the Court said:

(P. 706:) "The evidence raised a presumption " of such knowledge and acquiescence on the part " of the directors, but did not show it conclusively. " It presented a question of fact for the considera- " tion of the jury, and the jury found, as the evi- " dence fully warranted them in doing, that the " directors were ignorant of Warner's acts."

" When he is informed that the agent who has " made the paper has made it in the name of the " principal for his own use, he must be prepared " to show that *special authority* in that behalf has " been delegated by the principal, and cannot " rely upon the implied authority of the agent " to make such paper in the ordinary business of " the principal.

(P. 707:) " It would have been proper to in- " struct the jury that the plaintiff was entitled " to a verdict if they found that Warner had no " authority actually or ostensibly."

It is also recognized in *Lamson vs. Beard, 94 Fed. Rep., 30*, where the Court on appeal throughout dis-

cuss the question *whether the fact* of such authority was proved.

It was also recognized on the first appeal in this case (104 Fed. Rep., 214), where the same question was submitted to the jury, and the *main question discussed* in the opinion on appeal was the question whether the facts proved justified the conclusion that such authority *actually existed.*

See, also, the cases generally herein cited on the proof of authority of an officer or agent to act in matters wherein he is interested.

## Evidence of Authority Given to Bush.

Bush himself testified on this subject as follows (pp. 37 to 42):

"Q. Mr. Bush, you *drew other drafts* as cashier of "the Elmira National Bank *to your own order* besides "the $7,000 Quaker City draft which has been mention-"ed, did you not?

"A. Yes, sir.

"I drew some that were made out to my own order. "I drew such drafts as cashier in my own case. I drew "some in my own case that were made to my own "order.

"Q. All of those drafts *regularly came back* to the "Elmira National Bank, did they not?

"A. Yes, sir.

"Q. And were *kept among its vouchers?*

"A. Yes, sir.

"Q. And, unless they were lost, they were handed over to the Receiver on the termination of the bank?

"A. Yes, sir.

"Q. They remained open to the inspection of the clerks and officers of your bank, did they not?

"A. They were there in the bank.

"Q. And *open to the inspection* of any director or officer who desired to examine them?

"A. Yes, sir.

"Q. In the case of some of these drafts you *gave your check* drawn against your account in the Elmira National Bank to pay for them, did you not?

"A. Yes, sir.

"Q. And these checks remained in the custody of the bank for a considerable period before they were delivered to you?

"A. Yes, sir.

"Q. Was there any attempt, in any of these drafts drawn to your own order, or otherwise, in your own business, to *conceal* the fact that you were drawing drafts as cashier in your own favor?

"A. No, sir.

"Q. Was *any objection ever made* to your drawing such drafts?

"A. No, sir.

"Q. Was *any objection ever made* to your drawing drafts in your own order?

"A. No, sir.

"Q. *How far back did* your practice of drawing such drafts in your own name extend?

"A. I would not be able to state, but I should judge *from the first time I wanted a draft.*

"Q. And from that time on *whenever you wanted* a draft in your business you drew it?

"A. Yes, sir.

"Q. *Just as you would for anybody else?*

"A. *Yes, sir.*

Eight drafts of the Elmira National Bank on the Chase National Bank, being drafts subsequently marked Exhibits Nos. 4–11, inclusive, were produced by plaintiff's counsel from among plaintiff's papers and shown to the witness.

"These eight drafts were all drafts signed by me as cashier and issued to me by the Elmira National Bank. They were all duly returned to the Elmira National Bank after payment by the bank on which they were drawn, in the regular course of business, and remained among the vouchers in the bank.

"Q. Was *any objection ever made* by any one to the issuing or using any of these drafts?

"A. Not that I ever heard of.

These eight drafts appear in full on pages 43 to 49 of the Record. They are all drawn to the order of J. J. Bush individually and are signed by J. J. Bush, cashier, and are drawn on the Chase Bank. They run in date from February 17, 1891 (Exhibit 7), to May 6, 1892 (Exhibit 11).

As to Exhibits Nos. 4, 5 and 6, which are indorsed either to the Chase Bank or to its cashier, he testifies that, to the best of his recollection, they were issued in paying interest on his note at the Chase Bank (pp. 42, 43, 44). He subsequently testified (p. 50) that he believed that Exhibit No. 9 was in some way used for the purposes of the Elmira Bank, and the jury were instructed by the Judge (p. 113) that this draft might be laid outof consideration; although it remained among the vouchers of the bank and was an element which should have tended to lead the officers to notice of the fact that Bush was signing drafts to his own order.

Three drafts on the National Bank of North America to the order of J. J. Bush and signed by J. J. Bush, cashier, were put in evidence and appear in full on pages 52 to 54, two of them being dated October 5, 1892, and one December 13, 1892, but the witness having testified (p. 54) that he believed that they were used for the benefit of the Elmira Bank in some Southern litigation, the jury was directed that they need not be considered (pp. 112 and 113); although these drafts also remained among the vouchers of the bank and were an item in bringing to the knowledge of the Board of Directors and officers the fact that Bush was signing drafts to his order. He *never told the officers* that these drafts were used in the business of the bank (p. 55).

A further draft (Exhibit No. 33) to the order of J. J. Bush, dated February 15, 1893, on the Chase Bank, was put in evidence and appears in full at page 56. It is endorsed to the order of the cashier of the Chase

Bank, and Bush testified (p. 56) that he believed that it was used to make a payment on account of his note at the Chase Bank.

At page 50 he testified :

" I recollect that I was making payments at short " intervals of interest on the loan at the Chase Bank. " I would use drafts on the Elmira National Bank to " make such payments. I used such drafts during that " period for that purpose."

A check drawn by Bush on the Elmira Bank, dated February 28, 1893, reading " Pay to the order of dft. " to order of M. L. Greider, $600," and a corresponding draft of the Elmira Bank on the Hide and Leather Bank to the order of M. L. Greider for $600, dated March 1, 1893, signed by J. J. Bush, cashier, were also put in evidence and appear as Exhibits 35 and 36 in full on page 57.

Bush testifiies, page 58 :

" I signed that check and signed the draft as cashier. " The check was given for the draft, the draft was " issued for the check. I paid it to Greider in my own " private business. It was returned to the Elmira " National Bank after payment in the regular course " of business and remained among the vouchers of the " bank as did the check."

A similar check " to the order of dft. to Mutual Life Ins. Co." for $500, drawn by Bush, and a corresponding draft on the Chase Bank to the order of the Mutual Life Insurance Company for $500, signed by Bush, as cashier, both dated March 31, 1893, were also put in evidence and appear in full as Exhibits 38 and 39, pages 58 and 59. Bush testified (p. 59) :

" I signed the check and signed the draft as cashier. " The check was given to the Elmira National Bank " for the draft and the draft was issued against it. The " check remained among the vouchers of the Elmira " National Bank. The draft was returned to us in the " regular course of business after payment and filed

" among the vouchers of the bank. I believe the check " was used by me in my private business."

A similar check by Bush on the Elmira Bank " to the order of dfts. on New York (Central Trust, $300; Chase, $77.50)," and two corresponding drafts on the Chase Bank, signed by J. J. Bush, cashier, one for $300 to the order of the Central Trust Company, and one for 77.50 to the order of the Chase Bank, all dated April 3, 1893, were also put in evidence, and appear as Exhibits 47, 48 and 3, on pages 60 and 61. Plaintiff admits that they were not issued for the purposes of the Elmira Bank (p. 62).

Bush further testified, pages 64, 65 :

" I have in my possession some checks drawn by " myself on the Elmira National Bank and returned " after payment of my vouchers. *Some* of my vouchers " were *not returned* to me, and I have not got them in " my possession.

" I have with me certain checks of mine so drawn on " the Elmira National Bank and returned to me. " Among them are *checks which, on their face, appear* " *to have been drawn for drafts* of the Elmira National " Bank. Among them are thirteen which are now " shown to me. These thirteen were all signed by me. " The 'Paid' stamp which is on all of them but one is " the stamp of the Elmira National Bank, and the cut " in the paper of the one that has not that stamp indi- " cates cancellation by the clerk by placing it on the " spindle. In the course of business, he would do that " at the same time that he drew the draft indicated by " the check.

" I believe I *received from the Elmira Bank the* " *drafts indicated by or corresponding to the descriptions* " *in these checks.* I don't know on what bank these " drafts were drawn, but I would believe that they were " drawn on the Chase National. There is nothing in " my recollection or in the drafts that would lead me " to believe that, except it is the absence of the name " of any other bank. When I drew a draft on any

" other bank, I entered the name of the bank on the " check, so far as checks drawn for my personal drafts " were concerned. I have every reason to believe that " I received the drafts drawn against these checks."

Plaintiff's counsel tried to discredit this testimony by further questioning, but the part of Bush's deposition which he read on this subject *preceded* (p. 69) the following which was Bush's *final* testimony thereon (pp. 68, 69):

" Q. You have exhibited nineteen checks drawn by " you on the Elmira National Bank to the order in " some form or other of drafts, all of which appear to " have been paid by the Elmira National Bank and " returned to you as vouchers. Is it possible, *from* " *your recollection*, that in so many cases as these " you did not receive the drafts called for by those " checks?

" A. *It is not possible.*

" Q. Is it possible that you did not receive them in " a large proportion of those cases?

" A. I do not believe so.

" Q. As a matter of fact, have you not a strong be- " lief that you did actually, in almost every one of " those cases, receive such a draft?

" A. It would *require the evidence of the books to con-* " *vince me* that I did not receive the drafts in *each one* " *of the cases.*

" Your conviction from your *knowledge of the trans-* " *action* is such that you feel very confident of it, is it " not?

" A. I believe that is what those checks were drawn " for.

" Q. And that they achieved the purpose for which " they were drawn?

" A. I do.

" Q. They were all your transactions?

" A. They were transactions connected with the " drafts.

" Q. If a check failed to bring the draft called for,

" you would be very apt to have some recollection of " it, would you not ?

" A. I believe so."

Among said checks are eight which were admitted in evidence, marked Exhibits Nos. 51, 54, 55, 56, 58, 59, 60 and 66, and appear in full on pages 66, 67, 73 and 74. They are all signed by J. J. Bush, and run in date from 2d April, 1891, to 6th June, 1892. The Exhibits Nos. 51, 54, 56 and 60 read: " Pay to the " order of dft. to J. J. Bush." Nos. 55, 58 and 59 read: " Pay to the order of dft. to order J. J. Bush," and No. 66 reads: " Pay to the order of dft. on New " York." Four of these eight checks (Exhibits 51, 58, 66 and 59) were drawn for the four drafts heretofore put in evidence, and marked, respectively, Exhibits 4, 6, 10 and 11 (p. 66). The drafts received upon the other four of these checks (Exhibits No. 54, 55, 56 and 60) are missing from the vouchers of the bank; but it is admitted by plaintiff that drafts were issued by the Elmira Bank at the dates and for the amounts of these checks respectively (p. 71).

Seven more checks drawn by J. J. Bush on the Elmira National Bank, being in terms drawn for drafts to his order and showing on their face that the drafts were drafts on Philadelphia banks, excepting Exhibit 57, which was for drafts on the Bank of North America, were put in evidence and marked Exhibits Nos. 50, 53, 57, 64 and 65, and appear in full on pages 72, 74, 80 and 95. They run in date from January 8, 1891, to October 5, 1892. Bush testified (pp. 67 to 69) that these were some of his checks drawn on the Elmira National Bank for drafts and returned by that bank to him among his vouchers, and that he confidently believed from his knowledge of the facts that he received drafts of that bank on the banks indicated in the checks for the amounts stated therein. None of these drafts have been found among the vouchers of the Elmira Bank, but it is admitted that drafts at the dates and for the amounts of Exhibits Nos. 50, 53 and 64 were issued by the Elmira National Bank (p. 71).

Bush having testified (p. 71) that the Philadelphia drafts issued on his checks were used in litigation for the benefit of the Elmira National Bank (p. 71), those checks (Exhibits Nos. 50, 53, 64 and 65) were directed by the Judge to be laid out of consideration by the jury (p. 113); although they constituted matter which should have assisted to bring to the attention of the officers of the bank the fact that Bush was signing drafts to his own order.

In addition to the drafts above mentioned, the entries in the draft book of the Elmira National Bank on the Chase National Bank show a draft for $30, to the order of J. J. Bush under date of February 11, 1893, and under date of January 4, 1893, a draft for $200, drawn to "F. & M. Spencer, for Bush" (p. 94).

The Elmira bank was organized in the Fall of 1889 (p. 34), and Bush became its cashier in January, 1890, and continued as cashier until the failure of the bank in May, 1893 (p. 35).

We thus have direct evidence of the cashier himself that from the *beginning* of his office, and during nearly the *whole existence* of the bank, he was in the habit of drawing and using such drafts for his own benefit and to his own order; that this was done *openly* and without concealment, and that *no objection* ever was made on the part of any of the officers of the bank to such action. We also have numerous specific instances, extending through most of this period, of the exercise of this power.

On the former trial the evidence only showed the existence of the practice during the last six months of the bank's existence. *The great extension of the period covered by the evidence on the last trial is a distinguishing fact of essential importance.*

The *drafts themselves* returning to the bank as vouchers were *notice* of this exercise of power, and the *checks* which Bush drew on the Elmira National Bank, and which *remained* for a considerable period with that bank (pp. 75, 76), were also on their face evi-

dence and notice of the fact that he was drawing drafts to his own order. Both checks and drafts were, of course, subject to inspection on entry or checking up.

There was a teller or assistant cashier in the bank (p. 36). C. E. Selover was the original president of the bank, and continued to be such until January, 1891, when Jackson Richardson succeeded him, and Richardson continued to be president until the close of the bank (pp. 35, 63–4). There is no evidence that these presidents were not active and attentive in the affairs of the bank. There were also several clerks permanently employed (p. 52). These checks of Bush, entered, of course, and remaining as vouchers in the bank, and these drafts returning to the bank from the correspondents on whom they were drawn as vouchers must necessarily have come under the supervision and inspection of other persons beside Bush and there is every probability therefore that they did come to the notice of the other officers or directors of the bank.

Bush testified (p. 56) that all drafts drawn were returned by the correspondent banks at the end of each month.

> "They were then compared by some one with "the records of the Elmira National Bank to see "if they tallied. I think the work was done by "any one of the clerks who happened to be the "least busy. Sometimes by Mr. Smith [the as-"sistant cashier], sometimes by clerks under "him."

In addition to the usual presumption obtaining that the officers and directors know the transactions of the corporation, we have in cases of national banks a force added to this presumption from the fact that by statute (U. S. Rev. Stat., Sec. 5147), it is especially required in national banks that

> "Every director, when appointed or elected, "shall take an *oath* that he will, so far as the

> " duty devolves on him, *diligently* and honestly " administer the affairs of such association "— which oath must be immediately filed with the Comptroller of the Currency.

The presumption of performance of their duties by officers of national banks is a strong one.

Finn vs. Brown, 142 U. S., 56, 69.

The attempt of the plaintiff to *meet by evidence* the general presumption of knowledge and the facts and circumstances which were shown to exist in this case certainly did not go to the point of conclusive establishment of lack of knowledge, *or make anything more than a disputed question*, and did not justify the withdrawal of this question from the jury. The evidence consists in negative statements as to what he did not see the examining committee or directors do (p. 76), made by Bush, who stated that when the committee were in the bank he was busy a good deal of the time, and did not see everything that they did, and did not see all the acts of the directors when looking over the bank matters; and also the testimony of Coykendall, who was the *only director or officer* other than Bush called by the plaintiff to give any evidence on this matter. He testified as to the limited action of himself and F. H. Richardson as members of the examining committee in performing their functions on that committee, and that *he personally* did not know what officer of the bank signed the drafts on other banks. The real substance of his testimony on this subject, however, is contained in the following (p. 85):

> " I did not know for a certainty who was sign- " ing cashier's drafts on our bank. I don't know " what the other directors individually knew about " that. So far as I was personally concerned, *I* " *left it to Mr. Bush's personal judgment and con-* " *trol* as to how he signed those drafts."

The other directors were mostly residents of Elmira

(p. 91), the place where the depositions of Bush and Coykendall were taken.

In the proof by *defendant* of specific instances of the exercise of power by the cashier, the difficulty of ascertaining the instances in which these powers were exercised is considerable. There seems to be no complete record among the Receiver's papers of drafts drawn on any but the Chase Bank. The record of the drafts drawn on the Chase Bank does not show to whose order those drafts were drawn prior to October, 1892 (p. 71). It appears that many of the *drafts* of the Elmira Bank *have disappeared* from among the vouchers and it is singular that among them are *several of the drafts for which Bush's checks were drawn* which have been given in evidence, and the issuance of which drafts affirmatively appears upon the books of the bank (see pp. 87–89, 90–92, 94). A comparison of the book of record of drafts on the Chase Bank with the drafts found among the vouchers of the bank produced by the plaintiff for the dates of October 1st and September 1, 1891, and January 2d, 1892, shows that by the record 21 drafts were drawn on October 1st, and only 19 could be found, that 18 drafts were drawn on September 1st, and only 14 could be found, and that on January 2d, 34 drafts were drawn and only 29 could be found, and among those missing were the drafts drawn on those dates against checks of Bush which were put in evidence. Again, in the attempt to ascertain from the checks of Bush what instances of the exercise of this power had occured, the checks which he produced were merely those drawn for drafts to his *own order*. It appears, however, that the checks which he did produce did not cover all of the drafts to his own order which were actually produced in evidence. It is probable, tharefore, that either his file of returned checks is incomplete or that his examination of the files was insufficient. In fact, it appears that his checks from November, 1902, to about the first of April, 1893, cannot be found (pp. 76, 86).

In addition to the circumstances already noted,

tending to support the conviction that the exercise of this power was conceded to Bush, is the fact that Bush himself, and Jackson Richardson the president, together with D. C. Robinson, were in fact the controlling persons in the management of the bank and that Bush's management of the affairs of the bank was rarely interfered with (pp. 35, 51) although an active supervision and examination of the affairs of the bank was maintained (p. 52).

*Under all of the circumstances, the submission of the question of authority to the jury was required, and such submission was not legal error.*

We may add, in answer to some claims of plaintiff, that by the form of the transaction of May 5th, no additional risk was imposed on the Elmira Bank in connection with a possible default of the Quaker City Bank. The draft was that of the Elmira Bank, and if the Chase Bank could take it at all it could hold the Elmira Bank on it on any default of the Quaker City Bank. Moreover, the draft was against the Elmira Bank's account at the Quaker City Bank, and any risk in the matter was a risk to that *account*, and the draft added nothing. Whether it was taken for "deposit" or for "collection" made no difference to the Elmira Bank.

## POINT XII.

**It is not beyond the power of a bank to authorize its cashier to issue drafts for his own use.**

Plaintiff contends that the grant of such authority *at all* is beyond the power of the corporation on grounds of *public policy*.

If the cashier had the power at all, then the Chase

Bank was not obliged to inquire into the question whether he had in fact paid, or otherwise provided consideration for the draft, on familiar principles of the law of agency. The person dealing with an agent is entitled to rely on the presumption of such facts.

Bank of Batavia vs. N. Y., L. E. & W. R. R., 106 N. Y., 195, 199.
Goshen Nat. Bk. vs. State, 141 N. Y., 379, 387.

Judicial rules of conduct, rights or powers, imposed on grounds of public policy are commonly known as "judicial legislation," and by careful courts are resorted to with reluctance, and only under compelling considerations of high importance. The suggestion of the imposition of such a rule not previously asserted in order that the party suggesting it may have a recovery, based on past transactions, which he could not otherwise have, invites jealous scrutiny.

Restrictions of corporate powers, based on considerations of public policy are properly within the sphere of the legislature. Judicial interference to impose such restrictions is to be zealously avoided.

The burden is on him who claims that an act is void as against public policy to make it *plainly and obviously clear* that it is so; and he must show something more definite and clear than simply a conviction of public *expediency*.

Vidal vs. Girard's Exrs., 2 How., 127, 197.
Hartford F. Ins. Co. vs. C. M & St. P. Ry., 70 Fed. Rep., 201, 207.

A cardinal ground of objection to so-called judicial legislation is that it is necessarily *ex post facto*.

In the case of the present claim, it would not only be that, but would be contrary to a well accepted view both of the public and of the Courts.

*All of the cases* which have been decided upon the subject of cashier's drafts have *fully recognized* the power to give the authority (see cases under Point XI.) and the Goshen Bank case, 141 N. Y., 379, goes so far

as to hold that on grounds of public convenience and the nature of the case *such a power should be assumed* to follow from the position of the cashier.

When a person has committed himself upon a contract or an accepted transfer, the transaction should not be treated as void for public policy unless that public policy is *so clear* that the person in engaging in the transaction *ought to have known* that it was against public policy. When the Courts have been passing on such cases and considering and sustaining the validity of such powers without discovering any such objection to them, it can hardly be said that there is an invalidity so clear and apparent that an ordinary individual ought to have known of it.

If it be now declared by the Courts that it is beyond the power of corporations to give such authority, then all of those persons who have *heretofore* received payments by cashiers' drafts used in the business of the cashier, no matter how fully the authority may have been given and with what completeness the takers may have informed themselves with regard to such authority, knowing that the Courts have repeatedly treated the question of the authority as a mere question of fact, those takers must refund the amounts so received by them.

In view of the decision in the Goshen Bank case, it is, in fact, difficult to treat with seriousness the claim that it is beyond the power of the bank to grant the authority which in that case it is declared ought to be assumed.

The ground on which the Court is asked to declare the grant of authority to be beyond the power of the corporation is that the power affords an *opportunity* for its misuse, and that the opportunity is a *temptation*.

Is the Court by limitations of the powers of cashiers to remove from them all opportunities which may constitute temptations to them toward wrong-doing? Is it to go on and do the same service in the case of all bank employees? Is it to be declared as a general legal principle that banks have no power to give to

cashiers, or to employees, powers or other opportunities which may prove temptations to them? This is beyond the limits of practical affairs. It is impossible to make a logical statement of any basis or principle at the foundation of plaintiff's claim which can be accepted as law.

In all the history of banks, and of the losses to them coming from the risks involved in their practical management, in which much dependence has to be placed on personal trust, how many cases of loss have come before the courts arising from the exercise of the power in question? And in those cases, how many of the guilty parties, with a willingness to defraud, would have failed to reach the same end in some other well-known way if this means had been denied them?

Confidence in its chief agents, and a corresponding treatment of them, may be a valuable thing to a bank, both for its internal effectiveness, and for its standing before the world; and it may not be well for it to show itself unwilling in its own business to trust them in such matters.

It does not seem, however, that plaintiff is in a position to raise the question here discussed, as he is claiming upon the draft and the deposit of it.

## POINT XIII.

**There was no reversible error in the admission of evidence.**

Almost all of the exceptions to the admission of evidence relate to evidence which operates *circumstantially* to sustain the conclusion that Bush had authority to issue drafts for his own benefit. If a fact or circumstance in any degree, though slight, tends to make

this conclusion probable, then it cannot be said to be *error* of the trial Judge to admit evidence of it, unless it signally tends to distract or mislead the jury.

As was said in *Holmes vs. Goldsmith, 147 U. S., 150, 164 :*

> " *Great latitude* is allowed in the reception of " *circumstantial* evidence, the aid of which is con- " stantly required, and, therefore, where direct evi- " dence of the fact is wanting, the more the jury " can see of the surrounding facts and circum- " stances the more correct their judgment is likely " to be. ' The competency of ' a collateral fact " to be used as the basis of legitimate argument is " ' not to be determined by the conclusiveness of " ' the inference it may afford in reference to " ' the alleged fact. *It is enough* if this *tend*, even " ' in as light degree, to elucidate the inquiry, or " ' to assist, though remotely, to a determination " ' probably founded in truth ' (Stephenson vs. " Stewart, 11 Penn. St., 307). The modern tend- " ency both of legislation and of the decisions of " courts is to give as wide a scope as possible to " the investigation of facts."

In *Continental Insurance Co. of Penn., 51 Fed. Rep., 884, 887*, the Court say :

> " Whenever the necessity arises for a resort to " circumstantial evidence, either from the nature " of the inquiry or the failure of the direct proof, " objections to testimony on the ground of ir- " relevancy are not favored, for the reason that " the force and effect of circumstantial facts " usually and almost necessarily depend upon " their connection with each other, and circum- " stances altogether inconclusive, if separately " considered, may, by their number and joint " operation, especially when corroborated by moral " coinci dences, be sufficient to constitute conclu- " sive proof."

In *Golden Reward Mining Co. vs. Buxton Mining Co., 97 Fed. Rep., 413, 416*, the Court say:

> "If testimony is relevant to an issue, it is gen-
> " erally admissible, and the Courts will not or-
> " dinarily consider its weight, but will leave that
> " question to be determined by the jury."

It is further to be borne in mind that where evidence is erroneously admitted, the admission is cured by proper instructions in the charge and the jury is to be presumed to have conformed to such instructions and to have made a verdict in accordance with the charge in that respect.

Pennsylvania Co. vs. Roy, 102 U. S., 451, 458, 459.
Lamson vs. Beard, 94 Fed. R., 30, 38.

Important instructions of this kind were given, especially some directing the jury not to consider certain drafts which were in evidence.

In considering the question whether in such a case of circumstantial evidence the Court has improperly admitted evidence to the consideration of the jury, it may become perhaps a question whether the *discretion* or judgment of the Court has been used *fairly* toward the plaintiff. It is therefore proper to call attention to the fact that various matters which, it will readily be seen, might have been highly important in assisting the jury to come to a conclusion favorable to the existence of the authority were *excluded* by the trial Judge.

Among other things, he refused to allow testimony of Bush as to drafts which he drew in his own business to the order of others than himself (pp. 40, 41); or testimony that the drafts to his order, and his checks for drafts, were always submitted to the inspection of other employees of the bank (pp. 40, 41); or testimony that other officers also drew drafts in their own favor (p. 42).

He refused to allow in evidence a series of 15 drafts,

running from May 4th, 1891, to March 3d, 1893, of amounts varying from $75 to $360, all to the order of as cashier, of the Chase Bank, and signed by Bush the cashier, and excluded all evidence as to their use, including evidence that they were used to pay *instalments of interest on Bush's note at the Chase Bank* (pp. 50, 51),

He also excluded two drafts drawn on the Chase Bank, signed by Bush as cashier, for $4,997.50 and $5,000, and all evidence as to their use (p. 51).

Plaintiff's objection to Porter's testimony as to the transaction of May 5th (p. 22, Assgmt. of Error I.) is frivolous. His whole case is based on this transaction. He himself puts in the statement of account (Exh. B) as evidence of deposits and a charge then made, and now attempts to forbid the defendant to give direct evidence of the actual facts. The things said and done by Bush, Porter and Voorhees on that day were the facts, the *res gestæ*, which fix the legal consequences. The direct testimony of the actors is the best evidence, and the objection that it was not the best evidence was not made (p. 22).

The evidence as to the actual control of the bank was of *some* value toward showing the situation and the likelihood of authority being conceded to Bush and of the activity of the oversight of Richardson, the president, but it was not important nor made extended or prominent.

The evidence as to overdrafts was also insignificant, but such effect as it could have to strengthen the probability of a grant of power to make drafts by the fact of exercise of the similar power of overdrawing openly appearing on the books is not illegitimate or erroneous when taken in connection with the direct evidence of the continued issue of drafts.

Of course, the admission in evidence of small drafts, in connection with the evidence of larger ones, was not erroneous.

The admission of drafts drawn to the order

of other persons, in connection with Bush's checks showing on their face that they were given for these drafts was not erroneous. The drafts alone are evidence of one item necessary to the proof of authority—that is, the exercise of the power (see above, Point XI.), and they are accompanied by checks, which tended to give notice that they were drawn in Bush's business. Those admitted on this trial were admitted also on the former trial and were referred to in the opinion on appeal as tending to support the authority. The checks accompanying those drafts were all produced at the trial from the *plaintiff's* possession.

The answer of Bush objected to (Assnt. XXVI.) is of no consequence, and there is nothing tending to support the assertion that it is "hear-say."

## POINT XIV.

**There was no reversible error in the charge or the refusal of requests to charge.**

"The refusal of these requests to charge could not "have *prejudiced* it, and, therefore, the exceptions "based thereon are immaterial, and could not require "us to set aside the verdict."

N. Y., N. H. & H. R. R. vs. O'Leary, 93 Fed. R., 737, 740.

A charge to a jury is not to be subjected to minute criticism when it is not, taken as a whole, misleading.

Baltimore & Potomac R. R. vs. Mackey, 157 U. S., 72, 86, 87.

"The instructions given by the Court at the trial are "entitled to a reasonable interpretation."

Chicago G. W. Ry. Co. vs. Healey, 86 Fed. Rep., 245, 250.

Though certain language in a charge may be misleading if taken by itself, it is not error if it is not so misleading if taken with the proper context.

North. Pac. R. R. vs. Babcock, 154 U. S., 190, 201.

It is settled that in the United States Courts the Judge in charging the jury may express his opinion on the facts, if ultimately all matters of fact are left to the jury; and the power of the Court in this respect is not controlled by State statutes or practice.

Vicksburg R. R. Co. vs. Putnam, 118 U. S., 545, 553.

Simmons vs. U. S., 142 U. S., 148, 155.

The charge of the Judge was, on the whole, eminently fair to the plaintiff. It was particularly so on the principal question of the proof of authority. Certainly the result of the trial will not be set aside on account of any unimportant ruling or slight departure from mathematical correctness of statement, if any shall appear.

Most of the assignments of error relate to the main questions of the case, covered by the previous points.

A number of them we find it difficult to connect properly with matters in the charge and exceptions.

As to the requests to charge that the jury "are not to take into consideration" the two checks for $306.67 (Assgnts. 46, 47): These are Exhibits 55, 56 (p. 73). They are, on their face for drafts to Bush's own order. They are to be considered in connection with Bush's testimony (pp. 64–5, 69) that corresponding bank drafts were issued on them. As to the objection that it does not appear that Bush signed the drafts: The only officers authorized by the by-laws to sign drafts were the president and cashier (p. 62); and Richardson, who was president from March, 1891 (pp. 63, 35), never so far as Bush knows, signed a draft (p. 36). The only other authority given to any officer to sign was only to sign in Bush's *absence* (p. 63). It was the custom at this bank to date transactions after business

hours as of the next business day (pp. 96–7). Even if it appeared that *some* drafts on the date of those issued on these checks were signed by the assistant, Bush was present and signing during part, at least, of the day; and, as the drafts were drawn on his own checks, the probability that he was present in the part of the day in which they were drawn is so strong that it was certainly within the scope of the power of the jury—especially in view of the peculiar absence of the draft from among the plaintiff's files—to accept it, and within the power of the Court, in connection with the direct evidence of the issue of similar drafts, to allow these circumstances to be submitted to the jury.

As to the request to charge (Assgnt., 42):

" The jury are not bound to believe Porter's testi-
" mony upon any point not conceded by the plaintiff,
" even where the testimony is uncontradicted."

Porter ceased to be an officer or employee of the defendant nearly two years before the trial. His testimony as to most matters was fully corroborated. At the same time the Judge did, in effect, clearly leave it to the jury to disbelieve Porter's testimony. For instance, Porter testified absolutely to his good faith and want of notice, and yet the jury was distinctly charged to find upon it.

In the case of *Canajoharie Bk. vs. Diefendorf, 123 N. Y., 191*, cited by plaintiff on the argument below, the witness was at the time of trial not only cashier, but also a stockholder, and the ruling was only that it was not error for the Court to refuse to *take the case away from the jury*, who did disbelieve and find against the evidence of the cashier.

There is no such absolute rule is is claimed by plaintiff, and it may well be proper and allowable for the Court *even to direct a verdict* upon the testimony of a witness actually interested at the time of the trial.

Hull vs. Littauer, 162 N. Y., 569, 572.
Anderson vs. Boyer, 156 N. Y., 93, 99.

At all events the instruction in the form requested was certainly improper. It is entirely too broad. It

applies equally to all testimony whether supported by inherent probability or direct corroboration or not, and it does not suggest to the jury the ground upon which they might disbelieve, or which they had a right to consider in determining whether to believe. Such a bald and sweeping instruction in this case would have been improper and likely unduly to discredit the testimony and mislead the jury.

It is not error to refuse a charge which is in too broad terms and likely to mislead.

Fidelity and Deposit Co. vs Courtney, 186 U. S., 342, 364.

As to the objection to the charge as to burden of proof of bad faith, this charge related directly to the cash ; it is not clear that it related to the draft. It seems also to be directed to the subject of affirmative bad faith or " actual fraud " rather than technical good faith such as arises from " notice." All the arguments or suggestions on the subject of bad faith were fully called to the attention of the jury by the charge, and certainly with sufficient emphasis on those in favor of the plaintiff.

So far as the cash is concerned, even if the defendant were suing, there is no such burden on persons receiving cash as plaintiff claims. The rules, arising from public convenience, relating to such payments do not permit of it.

Southwick vs. First Nat. Bk., 84 N. Y., 420, 434.
Stephens vs. Board, 79 N. Y., 183, 187.
Justh vs. Nat. Bk., 56 N. Y., 478, 434.
Goshen Bk. vs. State, 141 N. Y., 379, 385.
Nassau Bk. vs. Nat. Bk., 159 N. Y., 456, 460.
Holly vs. Missionary Soc., 180 U. S., 284, 293-4.

The question of good faith is, of course, involved in the sense that, if *bad faith* is shown, the taker cannot retain the cash, and that is covered by the Judge's

charge. Plaintiff cites no case on the subject of the cash.

As to the draft, the Court proceeded to charge clearly and directly that the defendant took *with notice and at its risk* as to any lack of the cashier's power to draw the draft, and not only that, but that the jury should "*require clear proof*" (p. 114) of his power, so that the burden of the only question of good faith disclosed by the case as to this draft is placed on defendant.

But plaintiff's objection is not sound on general principles. The cases which he cites are ones in which the *holder* of commercial paper was *suing* on it, and necessarily had the burden of the issues. What is often spoken of as the burdens and shifting burdens of proof in cases of commercial paper are in fact, nothing but what is sometimes called the "burden of going ahead," and producing *some* proof, arising from certain technical presumptions or overcoming of presumptions on certain definite facts, but have nothing to do with the *burden of proof* to be considered by the jury at the end of the trial, and in disposing of which they consider these presumptions.

The issues in this case were made by denials of the plaintiff's allegations, and the burden of the issues is upon him, and remains with him throughout the trial. It never shifts.

Whitlatch vs. Fidelity & Cas. Co., 149 N. Y., 45, 50.
Farmers' L. & T. Co. vs. Siefka, 144 N. Y., 354, 358.
Merzbach vs. Mayor, 163 N. Y., 16, 20–1.
Kay vs. Met. St. Ry., 163 N. Y., 447, 453.

"There is confusion sometimes in treating of the "burden of proof, arising out of unexact defini- "tions. The burden is upon a plaintiff to establish his "cause of action when it is in proper form denied by "the other party. * * * It is very common to say "in such cases that the burden is upon the defendant "to establish the fact relied upon. All that this can "properly mean is that when the plaintiff has estab- "lished a *prima facie* case, the defendant is bound to

" controvert it by evidence, otherwise he will be cast in
" judgment. When such evidence is given, and the
" case upon the whole evidence, that for and that
" against the fact asserted by the plaintiff, is submitted
" to court or jury, then the question of the burden of
" proof as to any fact, in its proper sense, arises, and
" rests upon the party upon whom it was at the outset,
" and is not shifted by the course of the trial, and the
" jury may be properly instructed that all material is-
" sues tendered by the plaintiff must be established by
" him by a preponderance of evidence."

Farmers' L. & T. Co. vs. Siefka, *supra.*

## POINT XV.

### The cases relating to the Bank of Perth Amboy do not assist the plaintiff.

The case of Campbell vs. Upton (66 N. Y. App. Div., 434) sustains the Cashier's draft, both upon the general propositions stated in Goshen Bank case as to cashiers' drafts and also upon the proved authority of the cashier, as shown by his acts, in issuing drafts.

In the case of Campbell vs. National Broadway Bank, in the Circuit Court for the Southern District of New York, the charge is favorable to the drafts, and at least leaves the question open as a question of fact to the jury.

In the case of Campbell vs. Manufacturers' National Bank, in the Court of Errors and Appeals of New Jersey (51 Atl. Rep., 497), the Court appear to consider all of the cases in which prior issue of drafts was shown to have been cases in which the directors knew of and approved the particular drafts before their issue and took security therefor. The Court say:

" It would have been an entirely different situ-
" ation if he had been in the habit of drawing

" similar drafts against the bank's funds for his
" individual purposes before consulting the presi-
" dent or the directors and they had known of or
" subsequently approved such acts. That would
" have been a case within the principle ruled in
" Goshen Bank vs. the State of New York."

And again:

" That which was discernible by inspection upon
" the face of the draft or record, and which needs
" no investigation to show it to be out of the ordi-
" nary, and, therefore, speaks for itself, will no
" doubt raise an implied or constructive ratification
" if seen by officers or directors; and failure to ex-
" ercise ordinary care in checking off vouchers or
" inspecting records by bank officials, will no doubt
" also raise such a ratification, if it appears that if
" they had so examined the same a simple inspec-
" tion thereof would have shown the facts."

Notwithstanding the view of the facts which is suggested by the opinion of the majority, *six judges* dissented from the conclusion of the Court, DIXON, J., the only one writing an opinion, stating his opinion that the question should have gone to the jury.

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